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# CBS-Westmoreland trial, at midpoint, puts libel standard to test

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When lawyers for Gen. William C. Westmoreland rested his \$120 million libel case against CBS earlier this week, the 12-member jury had heard 19 witnesses, been read to from reams of cables and memorandums from the Vietnam era, watched taped interviews of key witnesses in the case, and received gentle guidance on libel law from US District Court Judge Pierre N. Leval.

Beginning Oct. 9, Westmoreland lawyer Daniel Burt spent more than 100 courtroom hours trying to prove that a 1982 CBS News documentary, "The Uncounted Enemy: A Vietnam Deception," was itself false and that it defamed the retired Army general. Because General Westmoreland, who was commander of United States forces in Southeast Asia from 1954 to 1968, is a well-known public figure and thus subject to stiffer libel standards, Mr. Burt also tried to show that the network was guilty of "reckless disregard" for the truthfulness or falsity of the charges made in the program.

Now the defense team, led by lawyer David Boies, is arguing its case.

"I think you will be convinced by the end of our case that this broadcast was true," Mr. Boies said as he began his presentation Jan. 8. "But independent of that, I think there can simply be no doubt that the CBS people who put this broadcast together believed it was true and had awful good reason to believe it was true."

George Crile, producer of the CBS documentary, is one of the defendants. Others, besides CBS News, are Samuel Adams, a former Central Intelligence Agency analyst who was a paid consultant for the program, and Mike Wallace, the CBS correspondent who narrated the program. In the documentary, which explored the issue of enemy-strength estimates prior to the Tet offensive in the early part of 1968, CBS charged that there was a "conspiracy at the highest levels" of military intelligence to underreport enemy strength. The program alleged that Westmoreland was a part of this conspiracy, which sought to give the impression to his superiors, politicians, the press, and the US public that the war against North Vietnam was being won.

Westmoreland is specifically suing over contentions that he purposefully misinformed President Lyndon B. Johnson and the Joint Chiefs of Staff during the war. The documentary alleged that in 1967 Westmoreland set a ceiling of 300,000 on reports of enemy strength. This was accomplished, in part, CBS said, by dropping certain categories from the military "order of battle," a list of enemy strength. The strength of the enemy during the Tet offensive surprised many Americans; it has been seen as a turning point in sentiment against the war.

The premise of the program was not new. A debate had been waged among intelligence analysts from the CIA and the Military Assistance Command, Vietnam, at the time. Mr. Adams had taken part in those debates, and his contention — supported by some other analysts — that estimates should be higher was eventually rejected. In 1975 Adams, who resigned from the CIA in 1973, wrote an article for Harper's magazine about the dispute, calling it "probably the biggest scandal in American military history." A congressional investigation resulted.

Burt called witnesses who were intimately involved in the unpopular war to show that there was no conspiracy to hide enemy troop data. These included Walt W. Rostow, President Johnson's national-security adviser; Robert Komer, chief civilian deputy to Westmoreland in 1967, and retired Lt. Gen. Daniel O. Graham, who was in charge of Army intelligence in South Vietnam at the time.

Westmoreland, taking the witness stand on his own behalf, denied any delib-

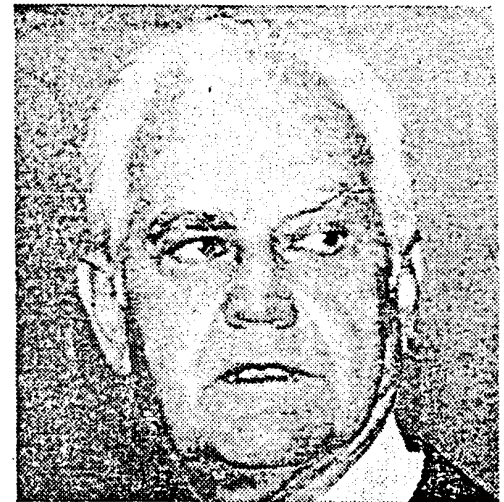
erate suppression of higher enemy strength estimates. He did admit that certain categories of enemy forces — specifically political cadre, self-defense personnel, and guerrillas — were taken out of the military order of battle. He defended the decision as one that made the estimates more meaningful and honest.

Burt has charged that Mr. Crile was under pressure to produce a "big story"

for CBS and that he used editing techniques and questionable interviewing procedures to subvert the truth. Crile, called as a witness by Burt, defended his interviewing and editing methods.

The press and First Amendment defenders throughout the country have been closely watching the trial, which many say could have profound impact on news-gathering methods and libel laws. Standards set forth by the US Supreme Court in a landmark 1964 ruling in the Times vs. Sullivan case require that public figures such as Westmoreland must prove "actual malice" in seeking redress for alleged libel. In order to determine whether that malice was present, legal experts say, juries have to determine the "state of mind" of those who produce news stories or programs and whether they had reckless disregard for the truth.

Judge Leval has used charts to instruct the jury on what "truth" is and what "state of mind" is. He has tried to keep the focus of the trial narrow, pointing out that the jury is not supposed to be thinking about freedom of the press or whether or not criticism of the government by the press is a good or bad thing.



Westmoreland seeking vindication